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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/502,021	07/20/2004	Jeanette Marcia Evans	J3646(6)	8722
201 7590 07/02/2009 UNILEVER PATENT GROUP 800 SYLVAN AVENUE AG West S. Wing ENGLEWOOD CLIFFS, NJ 07632-3100			EXAMINER SASAN, ARADHANA	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/502,021

Applicant(s)

EVANS ET AL.

Examiner

ARADHANA SASAN

Art Unit

1615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 June 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1, 4, 6-8, 11-15 and 18-23 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 4, 6-8, 11-15 and 18-23 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 19 June 2009 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date 06/19/09.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date: _____.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Status of Application

1. The remarks, amendments, and Request for Continued Examination filed on 06/19/09 are acknowledged.
2. Claims 2-3, 5, 9-10 and 16-17 were cancelled. Claims 1, 6, 11-15, 18-19 and 21 were amended. New claims 22-23 were added.
3. Please note that the status identifier for amended claims 19 and 21 is incorrect.
4. Claims 1, 4, 6-8, 11-15 and 18-23 are included in the prosecution.

Continued Examination under 37 CFR 1.114

5. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 06/19/09 has been entered.

Information Disclosure Statement

6. The information disclosure statement (IDS) submitted on 06/19/09 is acknowledged. The submission is in compliance with the provisions of 37 CFR 1.97 and 1.98. Accordingly, the examiner is considering the information disclosure statement.

See attached copy of PTO-1449.

Response to Arguments

Rejection of claim 1 under 35 USC § 112, second paragraph

7. Applicants' arguments, see Page 7, filed 06/19/09, with respect to the rejection of claim 1 under 35 USC § 112, second paragraph have been fully considered and are found persuasive. Therefore, the rejection of 03/06/09 is withdrawn.

Rejection of claims 1, 4-8, 10-15 and 18-21 under 35 USC § 103(a)

8. Applicants' arguments, see Page 7, filed 06/19/09, with respect to the rejection of claims 1, 4-8, 10-15 and 18-21 under 35 USC § 103(a) as being unpatentable over Brown et al. (EP 0 355 908 A1) have been fully considered and are persuasive. Therefore, the rejection of 03/06/09 is withdrawn.

Rejection of claims 1, 4-8, 10-15 and 18-21 under 35 USC § 103(a)

9. Applicants' arguments, see Page 7, filed 06/19/09, with respect to the rejection of claims 1, 4-8, 10-15 and 18-21 under 35 USC § 103(a) as being unpatentable over Tsaur et al. (US 5,726,138) have been fully considered but are not found persuasive.

Applicants argue that the particles of Example 3 (of Tsaur) are reported to be approximately 1000µm in diameter and that particles of such a diameter are significantly greater than the typical diameter of individual hair fibers and would not be expected to have the same ability to entangle between individual hair fibers as particles having the morphology requirements of the subject invention. Applicants argue that Tsaur et al. teaches toward the use of gel particles that are significantly larger than those of the subject invention.

This is not persuasive because Tsaur teaches the gelled particle size greater than 25 micrometers (Col. 3, lines 4-32), which meets the limitation of at least 50% by volume of the particles having a maximum width of 40 μ m. Regarding the limitation of at least 20% by volume of the particles having a maximum width of 20 μ m, one of ordinary skill in the art would find it obvious to modify the particle size of the gelled particles during the process of routine optimization since Tsaur teaches that "the size of the hydrogel composition in the final composition can be manipulated by changing the mixing speed, mixing time, the mixing device and the viscosity of the aqueous solution" (Col. 4, lines 52-55). The motivation to modify the particle size of the gelled particles during the process of routine optimization is provided by Tsaur who teaches that "the hydrogel must also be soft enough and capable of disintegrating smoothly when the composition is applied to and rubbed onto the intended substrate ... without causing any undesirable feeling of foreign matter or grittiness ..." (Col. 4, lines 19-24).

Additionally, the added limitations of the anionic surfactant and the composition that is in the form of a shampoo are taught by Tsaur (Col. 3, lines 9-11, Col. 12, lines 22-25, Col. 21, lines 10 and 41).

Therefore, the rejection of 03/06/09 is maintained.

Rejection of claims 1, 5-7 and 19 under obviousness type double patenting

10. Applicants' arguments, see Page 10, filed 06/19/09, with respect to the rejection of claims 1, 5-7, and 19 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4, 6 and 12 of U.S. Patent no. 7,169,427 in view of Brown et al. (EP 0 355 903 A1) have been fully considered and are

persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground of rejection is made in view of Tsauro.

Claim Rejections - 35 USC § 103

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

12. Claims 1, 4, 6-8, 11-15 and 18-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tsauro et al. (US 5,726,138).

The claimed invention is a cosmetic or personal care composition comprising: (a) gelled particles, wherein the gelled particles comprise water and a gelling polymer, and characterized in that at least 50% by volume of the particles have an aspect ratio of at least 5 and a maximum width of 40µm; at least 20% by volume of the particles have an aspect ratio of at least 10 and a maximum width of 20µm; and at least 5% by volume of the particles have an aspect ratio of at least 50 and a maximum width of 2µm and (b) anionic deterging surfactant; wherein the composition is in the form of a shampoo.

Tsauro teaches aqueous compositions containing hydrogel particles that "trap" water insoluble beneficial agents (Col. 2, lines 63-65). Tsauro teaches hydrogel particles "with controllable size and controllable gel strength [that] are prepared simply by first adding (e.g. injecting) an aqueous solution containing the said two polymers and the water insoluble material into the said aqueous medium to form elongated soft polymer gel noodles; and the noodles are then cut/broken (e.g., through mixing or mechanical

agitation) into desirable gel particle size" (Col. 1, lines 8-27). Advantages including enhanced deposition of a benefit agent on the skin or other substrate, and enhanced sensory properties (i.e. smooth and creamy feel) when the composition is rubbed on the skin are disclosed (Col. 1, line 62 to Col. 2, line 11). The aqueous composition comprises an aqueous solution, a hydrogel composition comprising hydrogel polymer(s) and a beneficial agent, where the hydrogel has a particle size greater than 25 micrometers (Col. 3, lines 4-32). The hydrogel compositions are designed for personal cleansing or skin care applications (Col. 3, line 65 to Col. 4, line 1). Tsaur discloses the process of preparing the hydrogel composition with low shear mixing processes along with manipulating the process parameters in order to modify the size of the composition (Col. 4, line 45 to Col. 5, line 27). Carrageenan is disclosed as a gel forming polysaccharide (Col. 6, lines 6-8). K-carrageenan is disclosed as a readily cross-linkable polymer (Col. 7, lines 6-7).

Tsaur does not expressly teach that at least 50% by volume of the particles have an aspect ratio of at least 5.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make a composition containing hydrogel particles with a particle size greater than 25 micrometers, as suggested by Tsaur, and calculate the aspect ratio of the particles by dividing the length of the particles with the width during the process of routine experimentation, and produce the instant invention.

One of ordinary skill in the art would have done this because given the dimensions of the particles, it would be part of routine experimentation to calculate the

aspect ratio of the particles. One with ordinary skill in the art would know that by dividing the dividing the length of the particles with the width, the aspect ratio of the particles can be calculated.

Regarding instant claim 1, the limitation of a composition with gelled particles and the limitation of a maximum width of the particles of 40 μm would have been obvious over the hydrogel particle size greater than 25 micrometers, as taught by Tsaor (Col. 3, lines 4-32). One of ordinary skill in the art would find it obvious to modify the particle size of the gelled particles during the process of routine optimization since Tsaor teaches that "the size of the hydrogel composition in the final composition can be manipulated by changing the mixing speed, mixing time, the mixing device and the viscosity of the aqueous solution" (Col. 4, lines 52-55). The motivation to modify the particle size of the gelled particles during the process of routine optimization is provided by Tsaor who teaches that "the hydrogel must also be soft enough and capable of disintegrating smoothly when the composition is applied to and rubbed onto the intended substrate ... without causing any undesirable feeling of foreign matter or grittiness ..." (Col. 4, lines 19-24). The aspect ratio of at least 50% by volume of the particles of at least 5 would have been obvious because one with ordinary skill in the art would calculate the aspect ratio during the process of routine experimentation. The limitation of an anionic deterging surfactant would have been obvious over the 2% to 40% surfactant (including anionic surfactant) (Col. 3, lines 4-12) as taught by Tsaor. Tsaor also teaches the anionic surfactant sodium lauryl sulfate (Col. 21, lines 10 and 41). The limitation of the composition in the form of a shampoo would have been

obvious over the compositions that may be formulated as products for washing hair like shampoos, as taught by Tsaur (Col. 12, lines 22-26). The limitation of the aspect ratio would have been obvious over the hydrogel particles taught by Tsaur because one with ordinary skill in the art would modify the length and/or width of the particles and calculate the aspect ratio during the process of routine experimentation. The limitation the maximum width would have been obvious over the hydrogel particle size greater than 25 micrometers, as taught by Tsaur (Col. 3, lines 4-32).

Regarding instant claim 4, the limitation of greater than 90% of the particles with a minimum width of 0.5 μ m would have been obvious over the hydrogel particle size greater than 25 micrometers, as taught by Tsaur (Col. 3, lines 4-32). The recited width of the particles would have been an obvious variant that can be modified during the process of routine experimentation unless there is evidence of criticality or unexpected results.

Regarding instant claims 6-7, the gelling polymer would have been obvious over the K-carrageenan as a readily cross-linkable polymer, as disclosed by Tsaur (Col. 7, lines 6-7).

Regarding instant claim 8, the limitation of the gelled particles that are present in the composition in an amount of from 0.1% to 60% by volume of the composition would have been obvious over the composition disclosed by Tsaur that comprises 0.1 to 30% by wt. hydrogel composition (Col. 12, lines 35-50). One with ordinary skill in the art would be able to convert the amount of the gelled particles from the % by weight to the % by volume of the composition during the process of routine experimentation.

Regarding instant claims 11-14, the limitation of the composition comprising one or more hair conditioning agents would have been obvious over the compositions comprising silicone oil (that condition skin or hair), as taught by Tsaur (Col. 23, lines 63-67). The limitation of a hair styling product would have been obvious over the acrylic copolymers taught by Tsaur (Col. 17, lines 26-29).

Regarding instant claim 15, the limitation of a method of treating would have been obvious over the shampoos and leave on products, as taught by Tsaur (Col. 12, lines 22-26).

Regarding instant claims 18-20, the limitations of the process for producing the composition would have been obvious over the process of preparing the hydrogel composition with low shear mixing processes along with manipulating the process parameters in order to modify the size of the composition, as taught by Tsaur (Col. 4, line 45 to Col. 5, line 27). The limitation of a composition with gelled particles and the limitation of a maximum width of the particles of 40 μm would have been obvious over the hydrogel particle size greater than 25 micrometers, as taught by Tsaur (Col. 3, lines 4-32). One of ordinary skill in the art would find it obvious to modify the particle size of the gelled particles during the process of routine optimization since Tsaur teaches that "the size of the hydrogel composition in the final composition can be manipulated by changing the mixing speed, mixing time, the mixing device and the viscosity of the aqueous solution" (Col. 4, lines 52-55). The motivation to modify the particle size of the gelled particles during the process of routine optimization is provided by Tsaur who teaches that "the hydrogel must also be soft enough and capable of disintegrating

smoothly when the composition is applied to and rubbed onto the intended substrate ... without causing any undesirable feeling of foreign matter or grittiness ..." (Col. 4, lines 19-24). The aspect ratio of at least 50% by volume of the particles of at least 5 would have been obvious because one with ordinary skill in the art would calculate the aspect ratio during the process of routine experimentation. The limitation of an anionic deterging surfactant would have been obvious over the 2% to 40% surfactant (including anionic surfactant) (Col. 3, lines 4-12) as taught by Tsaur. Tsaur also teaches the anionic surfactant sodium lauryl sulfate (Col. 21, lines 10 and 41). The limitation of the aspect ratio would have been obvious over the hydrogel particles taught by Tsaur because one with ordinary skill in the art would modify the length and/or width of the particles and calculate the aspect ratio during the process of routine experimentation. The limitation the maximum width would have been obvious over the hydrogel particle size greater than 25 micrometers, as taught by Tsaur (Col. 3, lines 4-32). The limitation of a silicone conditioning agent would have been obvious over the compositions comprising silicone oil (that condition skin or hair), as taught by Tsaur (Col. 23, lines 63-67).

Regarding instant claim 21, the limitation of the process for producing the composition comprising forming the gelled particles in the presence of the surfactant would have been obvious over the process of preparing the composition with the inclusion surfactants, as taught by Tsaur (Col. 9, lines 33-37).

Regarding instant claim 22, the limitation of one or more silicone conditioning agents where the composition is in the form of a hair conditioning composition would

have been obvious over the compositions comprising silicone oil (that condition skin or hair), as taught by Tsaor (Col. 23, lines 63-67).

Regarding instant claim 23, the limitation of a rinse-off composition would have been obvious over the rinse off compositions, as taught by Tsaor (Col. 12, lines 22-26).

Double Patenting

13. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

14. Claims 1, 5-7 and 19 remain rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4, 6 and 12 of U.S. Patent No. 7,169,427 (the '427 patent) in view of Tsaor et al. (US 5,726,138).

Although the conflicting claims are not identical, they are not patentably distinct from each other because the difference is that instant claims are drawn to a cosmetic or

personal care composition. The teaching of Tsaur with respect to a composition containing hydrogel particles with a particle size greater than 25 micrometers that can be in the form of a hair shampoo is stated above.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make the composition recited in claims of the '427 patent, combine it with the composition comprising gelled particles and its use in hair shampoos and conditioners, as suggested by Tsaur, and produce the instant invention.

One with ordinary skill in the art would do this because Tsaur teaches the incorporation of the gelled particles into personal care and hair shampoo compositions. Structurally the composition of instant claims is the same as the composition in the '427 patent.

Therefore instant claims are obvious over the claims of the '427 patent and they are not patentably distinct over each other.

Conclusion

13. No claims are allowed.

14. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Aradhana Sasan whose telephone number is (571) 272-9022. The examiner can normally be reached Monday to Thursday from 6:30 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward, can be reached at 571-272-8373. The fax phone

number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Aradhana Sasan/
Examiner, Art Unit 1615

/MP WOODWARD/
Supervisory Patent Examiner, Art Unit 1615